THE FOURTEENTH AMENDMENT AND SPECIAL ASSESSMENTS ON REAL ESTATE—NORWOOD *v.* BAKER, 172 U. S. 269.

Does the Fourteenth Amendment to the Constitution of the United States prohibit "assessments" on real estate in excess of special benefits, or by any other method than according to special benefits?

II.

THE cases decided by the Supreme Court of the United States down to the case of Norwood v. Baker clearly hold that the Fourteenth Amendment to the Constitution of the United States does not prohibit assessments on real estate in excess of special benefits, or by methods other than according to special benefits. In the case of Davidson *v.* New Orleans [1] (on writ of error to the Supreme Court of Louisiana), the construction of the Fourteenth Amendment on this very point came before the court. The estate of John Davidson was assessed about $50,000 for draining certain swamp lands in the state of Louisiana. The assessment was levied in that case according to the superficial area or square feet of land within the drainage section, that is to say, each square foot in the drainage district paid as much as any other square foot. There was no inquiry in regard to benefits, and the assessment was not levied according to benefits. The rule of apportionment adopted necessarily excluded the consideration of benefits. Not only so, but in the record on which that case was heard before the Supreme Court of the United States it was stipulated, among other things, that no drainage was done on plaintiff's land; that a portion of plaintiff's land did not need draining, having already been drained, and having paid the expense thereof; and that the whole assessment on the plaintiff's land amounted to about $50,000, of which $45,000 was assessed against one tract worth only from one fourth to one half that amount. This stipulation appears in the printed record on file in the office of the clerk of the Supreme Court at Washington. The question was thus clearly presented to the Supreme Court of the United States whether the Fourteenth Amendment prohibited such an assess-

[1] 96 U. S. 97.

ment. If ever there was a case of an assessment being a hardship upon a person, it would certainly seem that this case of Davidson was one. The Supreme Court, however, after stating, among other things, that "there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment," said (p. 104) : —

"As contributing, to some extent, to this mode of determining *what class of cases do not fall within its provision*, we lay down the following proposition, as applicable to the case before us : —

"Whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the state constitution against unequal taxation ; but the federal Constitution imposes no restraints on the states in that regard."

Note the language, "tax, assessment, servitude, or other burden." No distinction is made as to "assessments." Thus the Supreme Court of the United States in the Davidson case expressly decided that that "class of cases" did not "fall within the provision" of the Fourteenth Amendment ; in other words, that "the Fourteenth Amendment was not intended to cover, and did not cover, such a case ;" that is, did not deal with the subject of the levy and apportionment of taxes. That the court meant to decide and did decide in this case of Davidson *v.* New Orleans that the Fourteenth Amendment does not require that taxes and assessments be levied according to benefits, or not in excess of benefits, is also evident from what the court says (p. 106) : —

"It is also said that part of the property of the plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere if it were clearly so ; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds."

In answer to the objection that some of Davidson's property had already been assessed for a similar improvement, the court said (p. 106) : —

"It is said that the plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the state to tax or assess property twice for the same purpose, we know of no provision in the federal Constitution which forbids this, or which forbids unequal taxation by the states."

Observe the words "tax or assess," with no distinction. That the foregoing statement of the decision in Davidson *v.* New Orleans is correct, and according to the understanding of the members of the Supreme Court, is evident from what they state in regard to this case in their decisions. For example, Mr. Justice Gray, giving the opinion of the court in the case of Spencer *v.* Merchant,[1] (on writ of error to the Supreme Court of New York), says (p. 356): —

"In Davidson *v.* New Orleans, it was held that, if the work was one which the state had the authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant, and that part of the property assessed was not benefited, presented no question under the Fourteenth Amendment to the Constitution upon which this court could review the decision of the state court (96 U. S. 100, 106)."

Observe the language of the court, "*presented no question* under the Fourteenth Amendment;" that is, the Fourteenth Amendment does not deal with questions of levy and apportionment of taxes.

So, also, Mr. Chief Justice Fuller, giving the opinion of the court in the case of Walston *v.* Nevin[2] (on writ of error to the Court of Appeals of Kentucky), referring to the case of Davidson *v.* New Orleans, says (p. 582): —

"And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, *nor that the assessment is unequal as regards the benefits conferred*, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the federal Constitution. So the determination of the taxing district and *the manner of the apportionment* are all within the legislative power (Spencer *v.* Merchant, 125 U. S. 345; Stanley *v.* Supervisors, 121 U. S. 535, 550; Mobile *v.* Kimball, 102 U. S. 691; Hagar *v.* Reclamation District No. 108, 111 U. S. 701; United States *v.* Memphis, 97 U. S. 284; Laramie County *v.* Albany County, 92 U. S. 307). And whenever the law operates alike on

[1] 125 U. S. 345.

[2] 128 U. S. 578.

all persons and property similarly situated, equal protection cannot be said to be denied (Wurts *v.* Hoagland, 114 U. S. 606; Railroad Company *v.* Richmond, 96 U. S. 521, 529)."

In this case of Walston *v.* Nevin, the assessment for the original construction of the street was *apportioned upon land abutting on the street according to the number of square feet* (except some slight modifications as to corner lots not material to the case). No inquiry was made as to benefits. On the contrary, the rule of apportionment laid down in the statute, namely, apportionment by the square foot, of necessity excluded any inquiry in regard benefits, precisely as the rule laid down by the statute and ordinance in Norwood *v.* Baker of apportionment by the front foot of necessity excluded any consideration of benefits. The court distinctly held that the case was governed by the principle laid down by the court in Davidson *v.* New Orleans, and that the assessment was not rendered invalid by the Fourteenth Amendment.

In Fallbrook Irrigation District *v.* Bradley[1] (on writ of error to the United States Circuit Court for the Southern District of California), involving the validity of the irrigation statutes in California, an *ad valorem* assessment upon all the land within the irrigation district was held to be not contrary to the Fourteenth Amendment, although it was objected (p. 156) : —

"That the basis of assessment for the cost of construction is not in accordance with and in proportion to the benefits conferred by the improvement. And, finally, that land which cannot, in fact, be benefited may yet under the act be placed in one of the irrigation districts and assessed upon its value to pay the cost of construction of works which benefit others at his expense."

In the argument of this case, it was shown and urged upon the court that in the organization of these irrigation districts towns and villages were frequently included. In one instance the owner of a brick building, which was included in a district, objected that his brick building not only would not be benefited by irrigation, but on the contrary would be much injured by it. The Supreme Court, however, held that these irrigation statutes and the *ad valorem* assessment levied under them did not violate the Fourteenth Amendment. The court said (p. 170) : —

"As was said by Mr. Justice Miller in Davidson *v.* New Orleans, *supra*, where the objection was made that part of the property was not in fact benefited, 'this is a matter of detail with which this court cannot

[1] 164 U. S. 112.

interfere if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.' To the same effect Spencer *v.* Merchant, 125 U. S. 345; Lent *v.* Tillson, 140 U. S. 316, 333. In regard to the matters thus far discussed, we see no valid objection to the act in question."

The court further says (p. 175): —

"The fourth objection and also the objection above alluded to as the final one may be discussed together, as they practically cover the same principle. It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the works, is not in accordance with and in proportion to the benefits conferred by the improvement, and, therefore, there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation."

The court, also, after citing Davidson *v.* New Orleans, and Walston *v.* Nevin, as showing that such assessment did not violate the Fourteenth Amendment, says (p. 178): —

"There are some states where assessments under such circumstances as here exist, and made upon an *ad valorem* basis, have been held invalid, as an infringement of some provision of the state constitution, or in violation of the act under which they were levied. Counsel have cited several such in the briefs herein filed. We do not discover, and our attention has not been called to, any case in this court where such an assessment has been held to violate any provision of the federal Constitution. If it do not, this court can grant no relief."

Having considered the scope and meaning of the words "due process of law" in section 1 of the Fourteenth Amendment as those words appear and have been used in English and American constitutional history, and having considered certain cases decided by the Supreme Court in regard to assessments down to the case of Norwood *v.* Baker, we are now prepared to resume the consideration of the questions presented and decided in that case.

The court, in Norwood *v.* Baker, lays down the following proposition (p. 279): —

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation." [Italics are the court's.]

The same thing is stated in substance at the end of the court's opinion. Obviously, this general proposition needs some qualification ; otherwise it would amount to stating that no tax for a public improvement could be levied upon the owner of private property unless a *quid pro quo* substantially equivalent was given to him. This would indeed be a revolution in tax matters. This proposition, as it is stated by the court, applies to any and every kind of tax for a "public improvement." If the proposition as stated be true, it would be necessary, in the case of *any* taxes for *any* public improvement, to have an inquiry as to the special benefits conferred upon the taxpayer and make him a compensation equivalent to the tax. This language of the court, however, was used with reference to the matter then under consideration, namely, an assessment to pay for a public street. But the court did not restrict this language to the case of such assessment. This broad, general proposition of the court clearly is not correct. Neither is it correct to argue from any such broad, general proposition to the particular case which was then under consideration by the court. As the major premise is incorrect, the conclusion cannot be logically correct. If, however, the court had restricted its proposition to the particular case under consideration, it would then have amounted merely to a statement of the conclusion which the court finally came to concerning that case, and it would still have remained for the court to support its conclusion by legal principles.

The language of the court here employed as to compensation is not applicable to an argument on the subject of taxation, but would be applicable in the case of taking property by eminent domain. The distinction between taxation and eminent domain is clear and obvious. Taxation is a requirement by the government of a payment or contribution for public purposes, while a taking of property by eminent domain is the government taking to itself the *res* or *corpus* of the property. In the one case something is paid as a contribution for public purposes. The other case of eminent domain is really the case of a compulsory sale to the government. In the case of taxation, the contribution is levied and must be paid for the reason that the government which levies it is sovereign, and the contribution is needed for public purposes, and no *quid pro quo* is required. The person who pays the tax pays it because he is the subject and because the state is the sovereign, and as a matter of constitutional law it does not lie in his mouth to say whether or not he received any *quid pro quo* or an equivalent benefit for the tax.

"The taking of property by taxation requires no other compensation than the taxpayer receives in being protected by the government to the support of which he contributes." [1]

Judge Cooley, in considering some objections advanced against special assessments on constitutional principles, mentions, among other objections, the following: "That they take property, *i. e.*, money, and appropriate it to the public use without compensation." In answer to this objection he says: —

"This objection would seem to fall with the last [*i. e.*, that they take property without due process of law]. If special assessments are taxes, the compensation is conclusively presumed to be received by those who pay them. It is only on the assumption that they are laid in the exercise of the power of eminent domain that the objection could have any force whatever. But the distinction between the two cases is very clear." [2]

What Judge Cooley ought to have said, speaking more exactly, is that the Constitution does not require any compensation; but this is substantially the same as what he did say, namely, that "the compensation is conclusively presumed to be received by those who pay them."

The court, in Norwood *v.* Baker, says (p. 279): —

"The exaction from the owner of private property of the cost of a public *improvement* in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."

It is not obvious what distinction, if any, is intended to be made by the court between taxes for a public "improvement" and taxes for other purposes, nor is it by any means clear that any distinction exists between them. The particular public improvement which the court had under consideration was the construction of a public street, but a little reflection will show that almost all, if not all, taxes which are levied are for public improvements. The purposes for which they are levied must certainly be public ones, and if the word "improvement" is to be applied to these purposes, it ought to be applied as much to one purpose as to another. For example, there is no reason why public schoolhouses and other public buildings, municipal water works, sewers, lighting plant, almshouses, public museums, and public parks are not as much public "improvements" as a public street, and so also all the expenses for employees and for other purposes connected with all these public improvements.

[1] Per Mr. Justice Gray in Cole *v.* La Grange, 113 U. S. 1, 8.

[2] Cooley on Taxation, 2d ed., p. 264.

All of these purposes are or may be public, and are all equally entitled to be called public improvements. They are, therefore, all of them equally included in the proposition laid down by the court, and there is nothing stated in the opinion of the court which would furnish a basis for any distinction among them. Hence, under its proposition, the Fourteenth Amendment prohibits the exaction from the owner of private property of the cost of any of these public improvements in substantial excess of the special benefits accruing to him. If the proposition stated by the court be correct, then the ordinary *ad valorem* taxes levied in most, if not all, the states are invalid under the Constitution of the United States. If, however, the court in its proposition uses the words "public improvement" in any narrower or more restricted sense, then it is not improbable that the court may be called upon in cases that arise from time to time to say what it means by the words "public improvement," and to give some definition or description of them in connection with the rule already laid down by the court in Norwood *v.* Baker under the Fourteenth Amendment. It would be interesting to see just how the court would distinguish one kind of public improvement from another kind under the Fourteenth Amendment, — quite as interesting as to see how the court would distinguish an assessment from a tax under the Fourteenth Amendment.

If this proposition of the court be true as to a tax for a public improvement, it would also be true as to a tax for any other object so long as that object be public, the test of whether or not the purpose is one for which a tax can be levied being not whether the purpose is what may be called a public *improvement*, but whether the purpose is a public one. The Fourteenth Amendment, if it applies to the levy and apportionment of taxes at all, certainly makes no distinction between taxes for public improvements and taxes for any other public purposes.

The case of Norwood *v.* Baker involved an assessment upon land, but if the propositions and principles stated by the court be sound it is difficult to see why they must not apply equally to taxes upon personal property. The Fourteenth Amendment uses the word "property," and makes no distinction between the different kinds of property, whether it be real estate or personal property. If the Fourteenth Amendment prohibits the levy of state taxes upon land except according to benefit, it must equally prohibit the levy of state taxes upon personal property except according to benefit.

In Norwood *v.* Baker, the court mentions several times in its opinion the fact that the entire cost of the land taken and the cost of the condemnation proceedings, as well as the cost of constructing the street, was assessed upon the land of Baker by the front foot; in other words, that the land abutting upon the street constructed was required to pay for the land and all the expense of constructing the street. This fact is given such prominence in the opinion of the court that one might reasonably infer that it was regarded either as peculiar to this case of Baker, or as furnishing one of the reasons for the decision of the court. It is also said by the court that the cost of the land for the street, which land was taken from the land owned by Baker, was "assessed back" as a part of the cost of constructing the street. There were two separate and distinct proceedings: one was the taking by eminent domain of land of Baker on which to construct the street. This land was valued and the valuation confirmed by the court and the amount paid to the owner (p. 275). Afterwards, and as a separate and distinct proceeding, the assessment was levied to pay the cost of the land, including the cost of the condemnation proceedings, and also to pay the cost of constructing the street. Now it is obvious that in the case of the construction of every street the land which is necessary therefor must be condemned, purchased, or otherwise acquired and paid for (except when it is donated, as is frequently the case), and, in addition to the purchase price of such land, it is also necessary to pay the cost of construction of the street; and where condemnation proceedings are had, the cost and expense of such condemnation proceedings for properly vesting the title in the public are a proper part of the cost of the land. These expenses were all for public purposes. Clearly, these facts were not peculiar to the case of Baker. All of these facts would have been present if the streets in the village of Norwood had all been laid out at one and the same time, and if the tax had been a general *ad valorem* tax upon all the property in the village. It would in such case have been necessary to condemn the land taken for the streets and to make payment for the same, including the cost of condemnation proceedings, and also necessary to pay the cost of constructing the streets. Then the cost of all these combined would have been assessed back upon all the property of the village. The entire land in the village would thus collectively furnish all the land for the streets and receive pay for the same; and then a tax would be levied upon all the land in the village to pay the cost of the land and of condemning the same,

and also to pay the cost of constructing the street. There is, therefore, nothing peculiar in the case of Baker as to the items making up the assessment which she was required to pay. According to the rule or proposition stated by the Supreme Court, it cannot make any difference that in such a case the tax for all these items would have been made according to the value of the land, while in Baker's case it was made according to the front foot. In neither case is there any inquiry as to benefit, nor is the tax levied according to benefit, and in each case equally it might be that some lands would be taxed in excess of the direct and special benefits.

The Supreme Court, moreover, did not proceed in Norwood *v.* Baker upon the ground that there was any fraud or abuse of power involved in the case, but proceeded upon the sole and distinct ground that the assessment in question violated the Fourteenth Amendment, because it was levied according to front foot and not according to benefit. In other words, the court decided that under the Fourteenth Amendment there was *no power* to levy any assessment by the front foot, without any regard to whether there was any fraud or abuse of power.

Furthermore, the court expressly held (p. 290) that it was enough to render the assessment invalid that it was apportioned by the front foot; and that it was not necessary to show that the amount of the assessment exceeded the special benefit to the property assessed.

Parsons *v.* District of Columbia, 170 U. S. 45, is distinguished by the court in Norwood *v.* Baker on the ground that in the Parsons case the water system for which the assessment was levied was a comprehensive "system" for the district. But it at least deserves consideration whether there is any real distinction between the cases. The water system already existed in the District of Columbia, and many miles of water mains had already been laid therein. The assessment levied upon Parsons was an assessment for an addition to an existing system, and this addition was made (p. 49) under an act of Congress of August 11, 1894, which prescribed that "hereafter assessments levied for laying water mains in the District of Columbia shall be at the rate of one dollar and twenty-five cents per linear front foot against all lots or land abutting upon the street, road, or alley in which a water main shall be laid." In the case of Norwood *v.* Baker, the village of Norwood had an existing system of streets, and the land of Baker was assessed by the front foot for an addition to that system. This addition was as much a part of an existing system of streets as the addition of the

water main in the Parsons case was an addition to an existing system of water works. There was as much a system of public improvements in the one case as in the other. There is nothing in the report of the decision of Norwood *v.* Baker to show that all the other streets in the village had not been laid out upon the same plan as in Baker's case, and the cost assessed upon the owners of abutting property by the front foot. But suppose that the other streets in the village of Norwood had been laid out upon a different plan, and that the taxes to pay for such streets had been apportioned upon a different basis; even then the case would not have differed from the Parsons case, for it appears that in the latter case the act of Congress of August 11, 1894, above quoted, introduced a new rule as to the apportionment of the assessment. The act of June 23, 1873 (p. 48), had provided that in order to defray the expenses of laying the water mains and the erection of fire-plugs there should be levied a special tax of one and a quarter cents per square foot on every lot or part of lot which bound in or touched on any avenue, street, or alley in which a main water-pipe might thereafter be laid and fire-plugs erected; but the new assessment held valid in Parsons *v.* District of Columbia was by the front foot. There is, therefore, no real distinction in respect of the legislation and the facts before the court between the two cases of Norwood *v.* Baker and Parsons *v.* District of Columbia.

Obviously the Fourteenth Amendment has no application in this case of Parsons *v.* District of Columbia. The court would probably hold, however, that the Fifth Amendment does apply in the District of Columbia,[1] although there may possibly be a difference of opinion on this question.[2] No question appears to have been made in this Parsons case as to whether or not the assessment violated either of these amendments. If there was any question made under the Fifth Amendment, then the court must either have held that that amendment did not apply, or that the words there found, which are exactly like the words now in question in the Fourteenth Amendment, did not forbid an assessment by the front foot.[3] In discussing this case of Parsons *v.* District of

[1] Callan *v.* Wilson, 127 U. S. 540; Capital Traction Company *v.* Hof, 174 U. S. 1; Bradfield *v.* Roberts, 175 U. S. 291.

[2] See articles in the HARVARD LAW REVIEW, volume xii., as follows: P. 291, by Carman F. Randolph; p. 365, by C. C. Langdell; p. 393, by Simeon E. Baldwin; p. 464, by James B. Thayer; and article in same REVIEW, volume xiii, p. 155, by A. L. Lowell, and cases cited in these articles.

[3] If the provision of the Fourteenth Amendment, "nor shall any state deprive any person of life, liberty, or property without due process of law," requires the Supreme

Columbia in Norwood *v.* Baker, the court did not mention the Fifth Amendment, or state whether it regarded that amendment as applying to the District of Columbia. The Parsons case was discussed by the court as if it involved merely a matter of general law, as were also several of the other cases, including the New Jersey cases, cited by the court.

A curious bit of legal logic is found in certain decisions of the Supreme Court of Indiana, which is well worth considering, even at the expense of a slight digression, as showing one result of a court's making an arbitrary distinction between a "tax" and an "assessment." The constitution of Indiana provides as follows: [1] —

"No political or municipal corporation in this state shall ever become indebted, in any manner or for any purpose, to any amount, in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness, and all bonds or obligations, in excess of such amount, given by such corporations, shall be void."

This two per cent. debt limit is very small — much smaller than the usual five per cent. or ten per cent. limit prescribed by constitutions of certain other states. The legislature of Indiana in 1893 passed a certain statute, since then several times amended, which provides in substance for the construction of gravel roads in and

Court of the United States to hold, as respects state taxation, the proposition stated in Norwood *v.* Baker (p. 279), namely, "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation," then — unless United States taxes are exclusively controlled by other provisions of the Constitution — it may be difficult to see why the Fifth Amendment to the Constitution, which provides, among other things, that "no person shall be deprived of life, liberty, or property without due process of law," and which applies to the United States government in the states (whether or not it does in the territories), does not equally require the court to hold, as respects United States taxation in the states, that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation." If this proposition stated by the court be a sound interpretation of the clause in the Fourteenth Amendment, then an interesting question is presented as to how far United States taxation is governed by the same clause in the Fifth Amendment in view of all the other provisions of the Constitution on the subject of taxation. For example, are United States taxes which are exacted from owners of private property for the erection of post-office buildings, court-houses, river and harbor improvements, forts, arsenals, navy-yards, etc., etc., all subject to this rule stated by the court? If not, why not?

[1] Art. XIII. sec. 1.

through townships. This act provides, among other things, for the issue of bonds by any county to pay the cost of construction of such gravel roads. The bonds are in form the obligations of the county. The statute, however, provides that the bonds and the interest thereon shall be paid by the levy of a tax upon and according to the value of the property within the township or townships in and through which the road is constructed. The Supreme Court of Indiana has decided that bonds so issued are not county indebtedness, because the tax to pay them is an "assessment," inasmuch as it is not levied upon all the property in the county.[1] The same court also holds that these bonds are not an indebtedness of the township or townships in and through which the road is constructed, because the bonds are not issued by and in the name of the township or townships.[2] With these decisions in force construing the debt limitation of the Indiana constitution above quoted, gravel roads may be constructed and bonds issued therefor and *ad valorem* taxes levied on all the property in any township of the state in or through which such road is constructed without any limit, so far as this provision of the state constitution is concerned. In the view of the Supreme Court of Indiana it makes no difference that so far as the township is concerned the tax is levied *ad valorem* upon all the property in the township, precisely as the general property tax is levied in the township. Observe also that this result is reached by the Supreme Court of Indiana, although the debt limitation in the constitution above quoted is not made in any manner dependent upon the question whether the debt is to be paid by a "tax" or an "assessment." Thus the court by arbitrarily using the words "tax" and "assessment" reaches the curious result above stated. Of course this same legislation and same logic could be made to apply to other public purposes besides the construction of roads or streets, as, for example, to schools, waterworks, sewers, parks, — in fact to all public purposes.

Constitutions are supposed to deal with real things. It seems to deserve consideration whether it makes any real difference to the taxpayer in the township that the public contribution required by this Indiana gravel road act for the payment of the principal and interest of the bonds is called by the court an assessment and not a tax; and it also deserves consideration whether the debt limitation of the state constitution was not intended to protect the tax-payer in the township against the creation of a debt, to the

[1] Board *v.* Harrell, 147 Ind. 500.

[2] Board *v.* Reeves, 148 Ind. 467.

payment of which he must contribute, whether his contribution be called an assessment or a tax — at least when the assessment and the tax are levied upon his property in precisely the same manner and for the same amounts and for the same purposes.

The foregoing instance serves as an illustration of the mischief which may be effected by a court making an arbitrary distinction between an assessment and a tax, as respects a constitutional limitation which does not either expressly or impliedly make any such distinction. It may be interesting also to consider whether the Supreme Court of the United States would regard this Indiana gravel road tax as a tax or as an assessment, within the meaning of the principle laid down in the case of Norwood *v.* Baker. If it be regarded as an assessment, as held by the Supreme Court of Indiana, then as it was levied according to the value of the land, and no inquiry made as to actual benefit conferred upon the land, it would violate the Fourteenth Amendment, under the principle stated in Norwood *v.* Baker. Obviously, the land taxed may, and some of it must, be at considerable distance from the road constructed, and may derive little or no benefit from the road, while land near the road which is taxed on the same *ad valorem* basis may derive practically all the benefit. It might be well also to suggest on this question whether this gravel road tax is to be regarded as a tax or as an assessment under the rule laid down in Norwood *v.* Baker, that it will hardly do to say that this question, so far as the Fourteenth Amendment is concerned, is to be governed by whether this tax is levied on a part only of the land in a political subdivision, for in that event it would still be necessary to choose the political subdivision with reference to which the matter is to be determined. If the county be taken as such subdivision, one result would be obtained, namely, that this would be an assessment; but if the township be taken, the other result would be obtained, namely, that this would be a tax. Which one must be taken under the Fourteenth Amendment? As all these matters of the creation and dissolution of counties and townships are matters for the regulation of the state, and are not matters with which the Constitution of the United States is at all concerned, it is obvious that no distinction should be made under the Constitution of the United States based on the taking of one political subdivision of the state rather than another in determining whether a public imposition is a tax or an assessment. Any such decision made on such basis could obviously be circumvented by action of the state, either in its constitution, or in its statutes, or in both com-

bined. Thus, for example, suppose that it was determined that as respects the county this gravel road tax was an assessment, being levied only upon part of the property in the county. There is nothing in the Constitution of the United States to hinder the state from making the county coterminous with the boundaries of the township or townships in which the assessment or tax was levied, and then the assessment would be turned into a tax, and it would be unobjectionable under the Fourteenth Amendment.

It is not intended in this article to maintain that there is not or may not be a difference between a tax and an assessment as respects provisions in some of the state constitutions or state statutes. This article does not deal with such questions. Thus, for example, the constitution of the state of California provides [1] that all property shall be taxed in proportion to its value; and the Supreme Court of California holds that the word "tax" thus used does not include an assessment; and also holds that assessments equally with *ad valorem* property taxes are all levied under the taxing power.[2] It is also held by the Court of Appeals of New York that both taxes and assessments derive their authority from the taxing power.[3] With these distinctions, however, the Fourteenth Amendment to the Constitution of the United States has no concern. If that amendment has anything to do with the apportionment of state taxes, it is only with the generic power of taxation, and not with any one species of taxation to the exclusion of other species. Moreover, the rule or proposition stated by the court in Norwood *v.* Baker would, as is elsewhere stated in this article, render invalid under the Fourteenth Amendment the *ad valorem* property taxes levied in the states and ordinarily called "taxes," equally with what are called "assessments," for *ad valorem* taxes are not levied according to benefit.

Observe, also, that in the views presented in this article it is not sought to urge that taxes or assessments ought not to be levied according to benefit. That is a question for the consideration of the legislative body, but it is only one of the questions which a legislative body should take into consideration when it provides for the levy and apportionment of a tax. Obviously, there are many other considerations; one of these, for example, is the ability to pay. Exemptions of property below a certain amount are based

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[1] Art. XIII. sec. 1.

[2] Emery *v.* San Francisco Gas Co., 28 Cal. 345, 353.

[3] People *v.* Brooklyn, 4 N. Y. 419, 432. So, also, to the same effect is Dillon on Municipal Corporations, fourth edition, section 752.

upon the principle that persons with very small amounts of property ought not to be made to pay any tax. This principle, for example, was considered in framing the Illinois inheritance tax act, which exempted estates of decedents amounting to $2000 or less. The Supreme Court held that this exemption did not violate the Fourteenth Amendment to the Constitution of the United States.[1] The court also held in the same case that the fact that the statute in taxing estates above $2000 levied a tax of a larger percentage upon the larger estates did not violate the Fourteenth Amendment. Another principle is also frequently applied in determining the apportionment of a tax, namely, that property devoted to educational, charitable, or religious purposes should not be compelled to pay any tax, because of the fact that it is supposed to be for the public good that such institutions should be encouraged, by reason of the benefit they confer upon the general public. For the opposite reason, namely, that certain things should be discouraged rather than encouraged, heavy taxes are usually levied upon wines, liquors, and tobacco. These considerations and many others are proper for the legislative body to take into account in determining as to the levy and apportionment of taxes. There is no prohibition in the Constitution of the United States, especially none in the Fourteenth Amendment, against the legislative body taking all these matters into consideration. Nor is there generally to be found in the constitutions of the several states any provision restricting the legislative body to the consideration of only one of these questions that ought to affect taxation, namely, as to the benefit received by the person or property taxed. Whether it would be wise for the state constitutions to make any such restriction is a question as to which the argument is certainly not all on the side of the persons who would maintain that such restriction ought to be made. One of the many reasons why such restrictions ought not to be made is that there would be difficulty in enforcing them. A rule of *quid pro quo* enforcible by the courts as to all taxes would greatly obstruct their collection. It would upset most of our taxes. The general *ad valorem* property tax in the state, city, county, or any other subdivision of the state, could no longer be levied, but it would be necessary to have an inquiry and hearing in each instance as to benefit received by the person or property taxed. This would probably result in the government being hindered in its proper functions for want of revenue, owing to delays and contests in the courts.

[1] Magoun *v.* Illinois Trust and Savings Bank, 170 U. S. 283.

Nor is there any good reason why the constitutions of the several states or of the United States should thus restrict the legislative body in respect to that mode of taxation which is sometimes termed an "assessment." As we have seen above, no such restriction could be made effective without defining what is meant by the term "assessment." Various kinds of taxes have been called assessments both in the state courts and in the United States courts. Thus, for example, in the case of Davidson *v.* New Orleans, a drainage tax, levied according to area in a single taxing district, was called an assessment. So, also, a drainage tax in Hagar *v.* Reclamation District, levied according to benefits, was called an assessment. In Walston *v.* Nevin the assessment was levied by square feet upon property abutting upon the street improved. In Fallbrook Irrigation District *v.* Bradley, an assessment for irrigation purposes was levied *ad valorem* upon all the real estate in the irrigation district, including, among other things, houses and other buildings in towns. In Kelly *v.* Pittsburgh,[1] an *ad valorem* property tax for all city purposes was levied upon agricultural lands in the outskirts of a city, most of which purposes it was claimed could not be enjoyed by the land. In County of Mobile *v.* Kimball, an *ad valorem* property tax for improving the harbor of Mobile was levied upon one county instead of being levied upon the city or upon the whole state. All these taxes, except the tax in the case of County of Mobile *v.* Kimball, and Kelly *v.* Pittsburgh, were called assessments by the Supreme Court of the United States, while in those two cases they were called taxes. It is not obvious why the constitutions of the several states where these cases arose or the Constitution of the United States ought to require that these "assessments" be levied only according to benefits, or not in excess of benefits, and at the same time permit these "taxes" in the two cases of County of Mobile *v.* Kimball, and Kelly *v.* Pittsburgh, to be levied *ad valorem* and irrespective of benefits. If, therefore, a state constitution, or the United States Constitution, attempts to provide that any particular kind of taxes such as assessments shall be levied only according to benefits, or not in excess of benefits, it is necessary to make some definition of assessment, and some line of demarcation between assessments and other taxes.

Does the Fourteenth Amendment to the Constitution of the United States cut off the state legislative bodies from levying and

[1] 104 U. S. 78.

apportioning taxes in any other mode than according to benefits, and does it provide that taxes shall not be levied in excess of benefits? It certainly does not make any such restriction as to state taxes generally. Historically and on principle and on decided cases, the Fourteenth Amendment has nothing to do with the levy and apportionment of taxes. Does it make any such restriction as to assessments? If so, it must, as we have seen, make some definition of the word "assessment" which shall distinguish that kind of tax from all others. So, also, if the court is to distinguish public "improvements" from other public purposes for which taxes are levied, some definition must be given to the word "improvement." The court, I submit, has given no such definitions; neither has it stated any principles on which such definitions could be based. Neither has it given any sufficient reason why it is and how it is that the Fourteenth Amendment makes any such restriction upon the state legislative bodies as respects assessments. On the contrary, it has held as respects many taxes which the court itself has called assessments that the Fourteenth Amendment does not make any such restriction. The only decision of the court to the contrary is, I believe, in this case of Norwood *v.* Baker, and the decision in that case cannot, I submit, be supported either on principle or by precedent.

Harry Hubbard.

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